

**COMMONWEALTH OF MASSACHUSETTS  
BEFORE THE  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Petition of New England Power Company	)	
For Approval of the Divestiture of the	)	
Seabrook Nuclear Power Station	)	
	)	

D.T.E. 02-33

**INITIAL BRIEF OF NEW ENGLAND POWER COMPANY**

**I. Introduction**

On May 17, 2002, New England Power Company (“NEP”) petitioned the Department of Telecommunications and Energy (“Department”) for approval of the sale of NEP’s 9.95766 percent joint ownership interest in the 1,161 MW Seabrook Nuclear Power Station (“Seabrook”) located in Seabrook, New Hampshire, to FPL Energy Seabrook, LLC (“FPLE Seabrook”). NEP seeks approval of this transaction pursuant to the Department’s supervisory authority over all gas and electric companies under Massachusetts General Laws Chapter 164, § 76 and the standard established by the Department that the “sale process is equitable and maximizes the value of the existing generation facilities being sold” (*see Boston Edison Company and Commonwealth Electric Company*, D.T.E. 98-119/D.T.E. 98-126, at 5 (1999)). In addition, NEP requests that the Department make specific findings that will allow the divested assets to be designated as “eligible facilities” pursuant to §32 of the Public Utility Holding Company Act of 1935, as amended by the Energy Policy Act of 1992 (“PUHCA”).

As described below, the Department’s approval of NEP’s divestiture of Seabrook is in the best interest of NEP’s retail affiliates’ customers and consistent with the

Massachusetts Electric Utility Restructuring Act, Chapter 164 of the Acts of 1997

(“Restructuring Act”) and NEP’s Restructuring Settlement (“Restructuring Settlement”).<sup>1</sup>

Therefore, Massachusetts customers are best served by the Department’s expeditious ruling approving the petition. NEP has demonstrated that the auction sale of a controlling interest in Seabrook, which included its minority interest, resulted in one of the highest prices paid for a nuclear generating facility. Tr. Vol. 1, 7/1/02, p. 117 and Exh. NEP-2, at 5. Moreover, NEP has demonstrated that the proposed sale was the result of an open, nondiscriminatory and competitive auction process. NEP has thus established that it has met all applicable standards for the divestiture process and that approval of Seabrook’s exempt wholesale generator (“EWG”) status is consistent with the standards set forth in §32(c) of PUHCA.

## **II. Procedural History and Background**

The sale of Seabrook was conducted through a public auction that was managed and administered by J.P. Morgan Securities Inc. (“JPMorgan”), the designated exclusive sale manager. The auction concluded with the execution of a Purchase and Sale Agreement (“PSA”) by FPLE Seabrook on April 13, 2002. The 88.2 percent of Seabrook ownership interests being sold to FPLE Seabrook includes interests owned by North Atlantic Energy Corporation, The United Illuminating Company, Great Bay Power Corporation, NEP, The Connecticut Light and Power Company (“CL&P”), Canal Electric Company (“Canal”), Little Bay Power Corporation, and New Hampshire Electric Cooperative (together the

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<sup>1</sup> The Department approved the Restructuring Settlement on July 14, 1997. *Massachusetts Electric Company*, D.P.U. 96-25-A (1997). In addition, the Department later found the Restructuring Settlement substantially complied with or was consistent with the Restructuring Act. *Massachusetts Electric Company*, D.P.U./D.T.E. 96-25-B (1997).

“Selling Owners”).<sup>2</sup> Following execution of the PSA, NEP filed the present case in Massachusetts.

The Department issued an Order of Notice on May 22, 2002, in this proceeding. Pursuant to the Order of Notice, the Attorney General and FPLE Seabrook requested and were granted full intervenor status. In addition, the Department received and approved petitions for limited intervention from Canal, Cambridge Electric Light Company (“Cambridge”), Commonwealth Electric Company (“Commonwealth”), CL&P and JPMorgan. The hearing in this proceeding was consolidated with the hearings of Cambridge, Canal and Commonwealth, D.T.E. 02-34, and CL&P, D.T.E. 02-35, since all three proceedings involve the sale of Seabrook.

On June 12, 2002, the Department held a public hearing and procedural conference in this matter. No member of the public attended or submitted a statement. During the discovery period, NEP received and responded to twelve information requests from the Department and eleven information requests from the Attorney General. Additionally, JPMorgan responded to 27 information requests from the Attorney General and twelve from the Department.

An evidentiary hearing was held in Boston on July 1, 2002, at which NEP presented the supporting testimony of Terry L. Schwennesen and Paul M. Dabbar.<sup>3</sup> At the close of the

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<sup>2</sup> The non-selling owners consist of the Massachusetts Municipal Wholesale Electric Company, the Taunton Municipal Lighting Plant, and the Hudson Light and Power Department (together, the “Non-Selling Owners”). Pursuant to the Agreement for Joint Ownership, Construction and Operation of New Hampshire Nuclear Units dated May 1, 1973, as amended, NEP offered a right of first refusal to the Non-Selling Owners on April 18, 2002. This offer expired on June 18, 2002. The Non-Selling Owners did not exercise their right.

<sup>3</sup> Prior to the hearing and in support of its petition, NEP filed the prefiled direct testimony and attachment of Terry L. Schwennesen (Exh. NEP-1 and Exh. NEP-Attachment-TLS-1(revised)); the prefiled testimony of Paul M. Dabbar of JPMorgan (Exh. NEP-2); and the PSA and Related Documents for the Seabrook Nuclear Power Station dated April 13, 2002 (Exh. NEP -3).

hearing, a number of exhibits were received and admitted into the record. *See, e.g.*, Exhs. NEP-1 through NEP-3; Exhs. AG-NEP-1-1 through 1-33; Exhs. AG-NEP-3-1 through 3-5 (including AG-1 through AG-9); Exhs. DTE-NEP-1-1 through 1-24. Following the hearing, NEP responded to seven record requests from the Attorney General and one record request from the Department. JPMorgan responded to two record requests from the Attorney General.

### **III. Argument**

#### **A. Approval of the Seabrook Divestiture is in the Public Interest Given the Price Achieved and the Process Employed**

The Department has previously determined that in evaluating a request to divest generation assets it must assess whether the sale process was equitable and structured to maximize the value of the assets being sold. *See Boston Edison Company and Commonwealth Electric Company*, D.T.E. 98-119/D.T.E. 98-126, at 5 (1999); *see also Western Massachusetts Electric Company, New England Power Company, and Fitchburg Gas and Electric Light Company*, D.T.E. 00-68, at 10 (2000); *see also* G.L. c. 164, §1A(b)(1). The record in this proceeding demonstrates that the divestiture of NEP's Seabrook interest meets this standard.

##### **1. The Sale Process Maximized the Value of NEP's Ownership Interest.**

NEP's fundamental goal in the sale process was to maximize the net proceeds from the sale of NEP's ownership interest in Seabrook. The auction resulted in a final sale price of approximately \$836.6 million, subject to certain adjustments at closing, for the

approximate 88.2 percent ownership interest being sold.<sup>4</sup> Exh. NEP-2 at 19. This sale price equates to \$792/kilowatt (kW) of capacity purchased for Unit 1, one of the highest amounts received in a nuclear auction and exceeding the per unit price for Millstone Units 2 and 3.<sup>5</sup> *Id*; see also Exh. NEP-1, at 9.

A significant factor contributing to the favorable results of this sale for NEP is the premium associated with FPLE Seabrook being able to obtain a controlling ownership interest of the plant. Tr. Vol. 1, at 51-52, 54-56. NEP's ability to join its minority interest in the station with other owners was critical to NEP's ability to maximize the value of its ownership interest.<sup>6</sup> As Ms. Schwennesen testified,

If we do not go forward with the sale, that price would most certainly be lost. ...when a buyer of a plant is purchasing a controlling ownership of that plant, that there is a premium attached ... it has been our belief at New England Power Company all along that as a minority owner, going along with a controlling share and getting a pro rata share of that price would probably maximize the value that the minority owner could get. (Tr. Vol. 1, at 120).

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<sup>4</sup> The PSA provides for the Sellers to transfer their respective ownership shares of assets comprising Seabrook Station Unit 1 and Unit 2 and the applicable contracts, leases and permits relating to the operation of the Station. Exh. NEP-3.

<sup>5</sup> The final sale price of the Millstone assets auction equaled \$1.298 billion, equating to a per unit price of \$507/kW for Millstone Unit 2 and \$791/kW for Millstone Unit 3, for a total transaction price of \$664/kW of capacity purchased. *Western Massachusetts Electric Company, New England Power Company, and Fitchburg Gas and Electric Light Company*, D.T.E. 00-68, at 9 (2000).

<sup>6</sup> The New Hampshire Public Utilities Commission ("NHPUC") included NEP's ownership interest in the auction process pursuant to 2001 NH Chapter Law 29:15, II which provides that "the Commission shall expeditiously initiate and complete, in a manner consistent with RSA 374:30, the sale of nuclear generation assets located in New Hampshire required by the [PSNH] settlement in manner that benefits all New Hampshire customers with stranded cost recovery obligations associated with such assets." NEP's retail affiliate, Granite State Electric Company, is a New Hampshire public utility whose customers' stranded cost recovery obligations also are associated with Seabrook.

NEP's \$93.5 million pro-rata share of the net sale proceeds from the jointly owned assets will benefit Massachusetts customers by reducing rates by an estimated monthly amount of \$1.26 on a 500 kWh monthly bill. Exh. NEP-Attachment-TLS-1 (revised). Assuming that the closing of NEP's ownership interest occurs prior to December 2002, Massachusetts Electric Company's customers will be credited as early as January 2003 with an estimated \$50 million, which will reduce stranded cost charges. Exhs. NEP-1, at 10; NEP-Attachment-TLS-1 (revised).

In addition to the fact that the sale price is one of the highest amounts per kW received in a nuclear auction, other benefits to Massachusetts Electric Company's customers resulting from the proposed sale include:

- ?? no power purchase agreement associated with the sale, which is consistent with NEP's Restructuring Settlement and the competitive goals of the Restructuring Act;

- ?? a winning bidder that has a history of successful nuclear plant operations and is highly regarded throughout the industry and by the Nuclear Regulatory Commission; and

- ?? elimination of future uncertainty for NEP and its retail affiliates' customers regarding costs and liabilities associated with operation and decommissioning of Seabrook. Exh. NEP-1, at 9.

Finally, customers will benefit as the divestiture furthers the Commonwealth's goal of moving generation to the competitive sector. The Legislature in the Restructuring Act found that ratepayers were best served where competitive producers supply electric power and customers have the right to choose their suppliers. St. 1997, c. 164, §1(c). The Legislature further stated that competitive markets in generation should (i) provide electricity suppliers with the incentive to operate efficiently; (ii) open markets for new and

improved technologies, (iii) provide electricity buyers and sellers with appropriate price signals, and (iv) improve public confidence in the electricity industry. *Id.* at §1(g).

Given the benefits that NEP and Massachusetts Electric Company's customers will realize from the sale, the Department should expeditiously approve NEP's petition so that NEP's ownership interest may be included with the sale of the other Selling Owners' interests.

**2. The Sale Process was Equitable and Structured to Maximize the Value of the Assets Being Sold**

The Department has determined that a "sale process will be deemed both equitable and structured to maximize the value of the existing generation facilities being sold if the company establishes that it used a 'competitive auction or sale' that ensured 'complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale.'" *Boston Edison Company and Commonwealth Electric Company*, D.T.E. 98-119/D.T.E. 98-126, at 5 (1999), *quoting* G.L. c. 164 §1A(b)(2).

The record in this proceeding establishes that the sale of Seabrook meets this standard. The testimony of Paul M. Dabbar sets forth in detail the process that JPMorgan, the auction agent, followed with respect to the sale. The auction was a formal, competitive process that was open to all qualified bidders. Exh. NEP-2, at 19. The auction began with an information-gathering stage, during which period JPMorgan solicited interest from any entities known or believed to be potential bidders based upon their previous public statements, their position in the industry or their participation in recent sales of nuclear assets. *Id.* at 6.

The next step involved the preparation of an Offering Memorandum (“OM”) describing the Seabrook assets and the auction in detail. *Id.*; *see* Exh. NEP-AG-1-4 (confidential). JPMorgan provided the OM to all potential bidders who signed confidentiality agreements and met the minimum requirements for eligibility to participate in the auction. *Id.* All such bidders also received access to the electronic “data room” that was set up for the Seabrook auction on an Internet site, which contained the documents that were compiled for the sale process and a list of answers to “frequently asked questions” regarding Seabrook. *Id.*; *see* Exh. NEP-AG-1-8 (confidential). These bidders were provided with access to Seabrook and given the opportunity to participate in on-site management meetings and review additional documents. *Id.* at 7. Bidders were also given the opportunity to comment on the proposed transaction documents.

Following the due diligence phase, qualified bidders submitted binding bids that were subject only to on-site verification due diligence. *Id.* at 9; *see* Exh. AG-NEP-1-6 (confidential). JPMorgan evaluated bids based upon an assessment of each bidder’s financial, operational, safety and other qualifications, the present value of its binding bid, and its willingness to accept the material terms of the transaction. *Id.* at 11; *see* Exhs. AG-NEP-1-7 (confidential); AG-NEP-1-15 (confidential); AG-NEP-1-16 (confidential). The NHPUC Staff, UOMA and JPMorgan determined the leading bids and required that each of the Selling Owners advise them whether it accepted the leading bid recommendations. *Id.* at 12. Following the receipt of such consents from the Selling Owners, JPMorgan contacted the leading bidders and commenced post-bid negotiations. *Id.* JPMorgan, in conjunction with the NHPUC Staff and the Connecticut Department of Public Utilities’ Staff team known as the Utility Operations and Management Analysis Unit (“UOMA”), then conducted



final negotiations. Such face-to-face negotiations led to the execution and delivery of the final transaction documents on April 13, 2002. *Id.*

Based on the full and equal access that all bidders had to a competitive auction sale process, the Department's standards for the divestiture of nuclear generating assets have been met.

**B. An Expeditious Closing is in Customers' Best Interests**

Any delay in the closing schedule is not in the best interests of NEP or its retail affiliates' customers. The proposed transaction was the result of an open, non-discriminatory and competitive auction sale process that maximizes the proceeds from NEP's minority ownership interest in Seabrook. To put this favorable transaction in jeopardy<sup>7</sup> or to delay the benefits detailed above for Massachusetts Electric Company's customers would not be prudent, nor consistent with the goals of the Restructuring Act.

The PSA contemplates that Selling Owners holding fifty-one percent (51%) of the ownership interests may close without the participation of the other remaining Selling Owners. Exh. NEP-3, § 6.3(a). In order for NEP to close with the majority Selling Owners, Sections 6.1(c) and (d) of the PSA require that FPLE Seabrook and NEP obtain all specified regulatory approvals, including the approval of the Department of this sale, and that the Department make all findings required by §32(c) of PUHCA.

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<sup>7</sup> As NEP owns only a minority interest in Seabrook, should NEP not be able to close with FPLE Seabrook, NEP would be unlikely to receive as favorable a price if it were to attempt to sell its interest separately.

**C. NEP's Sale of Its Interest in Seabrook is Fully Consistent with the Massachusetts Electric Utility Restructuring Act, the Standards Set by the Department and NEP's Restructuring Settlement**

The Restructuring Act requires that each electric company organized under the provisions of G.L. c. 164 file a plan for restructuring its operations to allow for the introduction of retail competition in generation supply in accordance with the provisions of G.L. c. 164. G.L. c. 164, §1A(a). Among other things, the Restructuring Act requires that all restructuring plans contain a detailed accounting of the company's transition costs and a description of the strategy to mitigate those transition costs. *Id.* One possible mitigation strategy is the divestiture of a company's generating units. G. L. c. 164, §1.

In reviewing a company's proposal to divest its generating units, the Department considers the consistency of the proposed transactions with the company's restructuring plan, or in some cases the company's restructuring settlement, and the Restructuring Act. *Western Massachusetts Electric Company, New England Power Company, and Fitchburg Gas and Electric Light Company*, D.T.E. 00-68, at 3. As described in Section A of this brief, the Department has held that a divestiture transaction will be determined to be consistent with the company's restructuring plan or settlement and the Restructuring Act if the company demonstrates to the Department that the "sale process is equitable and maximizes the value of the existing generation facilities being sold." *Id.* at 3-4.

Given the evidence in the record, and as described herein, NEP's actions and the resultant sale fulfill the Commonwealth's restructuring goals. Moreover, the sale of NEP's approximate 9.96% joint ownership interest in Seabrook expressly carries out the terms of NEP's Restructuring Settlement. Specifically, NEP's Restructuring Settlement contains a provision in Section V.D.2. that states:

NEP will endeavor to sell, lease, assign, or otherwise dispose of its minority shares of nuclear units or entitlements on terms that will assign ongoing operating costs and responsibility to a nonaffiliated third party but may require NEP to retain the obligation for post-shutdown, decommissioning, and site restoration for these units and entitlements. NEP shall recover these post-shutdown, decommissioning, and site restoration costs from Mass. Electric through the Contract Termination Charge or the Residual Value Credit, and shall credit any net positive value or recover any payments associated with such transaction in the reconciliation of the Contract Termination Charge or the Residual Value Credit.

*See* Exh. NEP-1, at 5.

The transfer of NEP's ownership interest to FPLE Seabrook fully implements the terms of the Restructuring Settlement quoted above. By participating in the Seabrook auction process, the sale of NEP's minority interest fully complies with NEP's commitment in the Restructuring Settlement to endeavor to sell, lease, assign or otherwise dispose of its minority shares of nuclear units on terms that will assign ongoing operating costs and responsibility to a nonaffiliated third party. *Id.* at 5-6. Moreover, FPLE Seabrook will assume substantially all liabilities associated with the operation of Seabrook, including the decommissioning liability for the acquired portion of Seabrook.

**D. Designation of Seabrook as an "Eligible Facility" is Warranted**

NEP also has requested that the Department make the findings necessary for the Seabrook assets to be declared "eligible facilities" under PUHCA so that FPLE Seabrook can seek a determination from the Federal Energy Regulatory Commission that acquiring the divested assets qualify it to be an EWG under §32 of PUHCA. Section 32 of PUHCA defines an EWG to be "exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale." PUHCA, §32(a)(1). An eligible facility is one "used for the generation of

electric energy exclusively for sale at wholesale.” *Id.* at §32(a)(2). With respect to such a facility that was already under construction or operating on the date of the enactment of §32 and already covered in state rates or charges for electric energy sold directly to customers, §32(c) requires specific state determinations before such facility may become an eligible facility. These state determinations are “that allowing such facility to be an eligible facility (1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law....” *Id.* at §32(c).

The Department should make the above findings with regard to the Seabrook facility for a number of reasons. Consumers will benefit because additional generating capacity will be available for sale in the competitive market. Exh. NEP-1, at 12. Because the competitive market is expected to function more efficiently than the rate-regulated system of generation, consumers should ultimately benefit through lower prices. *Western Massachusetts Electric Company, New England Power Company, and Fitchburg Gas and Electric Light Company*, D.T.E. 00-68, at 11. Second, designation of the facilities as eligible facilities is in the public interest because it supports the Commonwealth’s stated goals to eliminate the vertical integration of the electric utility industry and to make electricity generation a competitive function. *Id.* at 17. Additionally, such designation does not violate state law; in fact, the Department has previously indicated that such divestitures actually further the objectives of state law. *Id.*

With regard to another nuclear divestiture where the facility was located out-of-state, the Department found that “[b]ecause the expectation of eligible status is an underlying component of the purchase price of the assets, and the sale price mitigates transition costs paid by ratepayers, the Department finds that the designation of the assets as ‘eligible

facilities’ satisfies the requirements of §32(c) of PUHCA.” *Western Massachusetts Electric Company, et al.*, D.T.E. 00-68, at 16. The Department further stated, “in addition to benefiting ratepayers, a designation of the assets as EWG will contribute to the development of the competitive wholesale generation market, and is, therefore, in the public interest.” *Id.* The Department also noted that “competing wholesale generators, including EWGs, will be an integral part of the competitive generation industry that the Restructuring Act was designed to enable.” *Id.* at 16-17.

Accordingly, NEP requests that the Department determine that allowing the divested assets to become eligible facilities, as defined in §32 of PUHCA as amended (1) will benefit consumers, (2) is in the public interest, and (3) does not violate state law.

#### **IV. Conclusion**

NEP’s divestiture of its minority interest in Seabrook as part of the approximate 88.2 percent being sold maximizes value for NEP and benefits customers of NEP’s retail affiliate, Massachusetts Electric Company. This transaction was a result of a competitive auction sale process that provided open and non-discriminatory access to bidders at every stage in the process. Additionally, the sale is another step in NEP’s divestiture of its entire generation portfolio and advances the restructuring of the electric industry as a whole in Massachusetts and New England. In all respects, the transaction complies with the express terms of NEP’s Restructuring Settlement and is consistent with the public interest and G.L. c. 164. For the reasons stated herein, NEP respectfully requests the Department to approve the sale of NEP’s 9.96% interest in Seabrook to FPLE Seabrook and make such necessary findings as required by §32(c) of PUHCA. NEP also respectfully requests that the Department approve NEP’s Petition, together with the Petitions of Cambridge, Canal and Commonwealth in

D.T.E. 02-34, and CL&P in D.T.E. 02-35, by September 6, 2002, so NEP may close simultaneously with the other Selling Owners of Seabrook.

Respectfully submitted,

NEW ENGLAND POWER COMPANY  
By its attorney,

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Laura S. Olton  
25 Research Drive  
Westborough, MA 01582

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